note that a EA licensee can satisfy our construction requirements with minimal build-out, while an existing SMR must build out all frequencies at all sites regardless of market demand.[136] Pro-Tec adds that our rationale for a five-year construction period is flawed because it rested, in part, on an order finding that a two-year construction period was sufficient for existing SMRs.[137]

79. Finally, Banks argues that 50 percent minimum channel use should be required at more than a single location within the EA.[138] Banks argues that otherwise, a licensee could meet this requirement by building a multi-channel facility in a rural portion of an EA and avoid serving a metropolitan area. Banks contends that this would enable EA licensees to avoid constructing true wide-area systems and to warehouse spectrum.[139]

80. Discussion. We decline to reconsider our five-year construction deadline. We are unpersuaded by Bank's unsupported assertion that a five-year construction period for EA licensees does not serve the public interest. We are also unpersuaded by Bank's claim that our EA construction requirements will allow those who warehouse to be unjustly enriched at auction. To the contrary, the auctions process requires licensees to purchase the rights to, and thereby compensate the American taxpayer for, the spectrum that they use. Thus, our auction rules discourage speculation and spectrum warehousing. Moreover, we do not agree that our five-year construction requirement will result in or reward spectrum warehousing. The five-year requirement assures that geographic licensees will promptly build out and provide service.[140]

81. We also reject claims that we have acted discriminatorily by adopting a two year construction requirement for site-by-site licenses and a five year build out for EA licensees. Further, we reject Pro-Tec's claim that our rationale for granting EA licensees a 5 year build out period, while limiting existing site licensees to an additional two years, is flawed. We impose a two year build out period on site licensees because, by definition, they are seeking authority to build and operate a particular site. EA licensees, in contrast, will be building multiple sites throughout their licenses entire geographical area and thus require a longer build out period. Moreover, the competitive bidding process provides incentives for EA licensees to build out quickly, and thus reduces the likelihood that a longer construction period would lead to spectrum warehousing.

82. Finally, we reject Bank's proposed expansion of the 50 percent channel use requirement because we find that its concerns are too speculative, and its suggested approach too rigid. It would be economically irrational for a licensee to construct multiple channels in areas where there is limited demand while leaving areas where demand is greatest covered by only a single channel. Moreover, licensees should have the flexibility to determine how best to provide services in response to consumer demand. We do not believe that we should micromanage how the EA licensee chooses to provide

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136 Southern Petition at 14.

137 Pro-Tec Mobile Petition at 10.

138 Banks Petition at 21-22.

139 *Id.*

140 *See generally, Spectrum Policy Statement.*

service.[141]

2. Extended Implementation Authority

a. Dismissal of Pending Extended Implementation Requests

83. Background. In the *800 MHz Report and Order*, we stopped accepting requests for extended implementation authority, accelerated the termination date of pending extended implementation periods, and dismissed pending requests for extended implementation authority. We reasoned that retaining extended implementation authority for up to five years would impede EA licensees' construction efforts, and that parties still wanting extended implementation could apply for EA licenses under our new rules.[142]

84. Petitions. Digital Radio seeks reconsideration of our dismissal of pending requests for extended implementation and our decision to reduce previously granted construction periods from five to two years. Digital argues that eliminating existing extended implementation periods unfairly harms incumbent SMR providers.[143] Digital claims that it relied on having a full five years to complete its regional, wide-area, SMR systems.[144] Thus, Digital argues our decision will "destroy [its] business expectations" and disserve the public interest.[145] Digital also argues that eliminating extended implementation authority is an unlawful deprivation of the property interest which it contends it has in its FCC licenses and the continuation of those licenses. Digital argues that to deny or revoke such a license without cause violates the licensee's due process rights.[146]

85. Digital also claims that eliminating extended implementation periods will harm the public and the CMRS industry by excluding small and mid-sized SMR providers from the CMRS marketplace.[147] Digital argues that small SMR providers may lack the resources to acquire spectrum for their current markets at auction.[148] It asserts that eliminating extended implementation compounds this problem by stranding investment in SMR systems whose construction periods will be cut short.[149]

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[141] Nextel Petition at 17.

[142] *800 MHz Report and Order*, 11 FCC Rcd at 1526, ¶ 114.

[143] Digital Petition at 2.

[144] *Id.* at 3.

[145] *Id.* at 4 (citing *Open Video Systems Proceeding*, in CS Docket No. 94-96, in which we upheld a company's business plans made in reliance on Commission's rules).

[146] *Id.* at 5, note 11, note 12.

[147] *Id.* at 6.

[148] *Id.* at 7.

[149] *Id.* at 8.

86. Finally, APCO argues that we have recognized that public safety agencies need extended implementation because complex government funding mechanisms impede rapid deployment of public safety systems.[150] It argues that extended implementation should be available to public safety systems in the General Category. ITA argues that extended implementation should be available for all private radio licensees in the General Category, because problems such as budgetary constraints affect the I/LT and Business users as much as Public Safety licensees.[151]

87. Discussion. We reject Digital's claim that eliminating extended implementation interferes with legitimate business expectations.[152] First, these licensees have already been given significant time to complete construction. Second, upon adequate rejustification, licensees will have up to two years to complete build out of their systems. Far from being a "drastic change" that will strand investment, as Digital contends, this is an equitable transition to a more efficient method of providing service and using spectrum. Finally, Digital's reliance on the public interest analysis in the *OVS NPRM* is also misplaced. While, the *OVS* proceeding did acknowledge a strong public interest in establishing a level of certainty in business plans, we did not suggest that a licensees' business expectations were entitled to absolute protection, nor did we imply that these expectations would always dictate the course of future regulation.[153]

88. Digital's claim of a property interest in its license is also without merit. Both Section 301 of the Communications Act and relevant case law establish that licensees have no ownership interest in their FCC licenses.[154] Moreover, we do not agree that ending extended implementation will decrease competition. To the contrary, competitive bidding, which allocates resources to those who value them most, is a more efficient and competitive method than our prior rules for licensing spectrum on an extended basis. We also disagree that terminating extended implementation will limit small business participation. To the contrary, we have adopted special provisions, such as bidding credits, in order to assist small businesses at auction.[155]

89. Finally, in response to APCO, we note that we only curtailed extended implementation for SMR licensees.[156] Thus, non-SMR licensees with existing extended implementation grants are not

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[150] APCO Reply to Oppositions to Petitions at 8.

[151] ITA Opposition to Petitions at 4.

[152] Implementation of Section 303 of the Telecommunications Act of 1996 -- Open Video Systems, *Report and Order and Notice of Proposed Rulemaking*, FCC 96-99, at ¶ 25 (March 11, 1996) (hereinafter "OVS NPRM").

[153] *Id.*

[154] 47 U.S.C. § 301. *In re Beach Television Partners, Orix Credit Alliance, Inc. v. Mills*, 38 F3d 535, 536 (11th Cir. 1994)(*citing FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)); *see also Orange Park Florida T.V. v. FCC*, 811 F2d 664, 674 fn.19 (D.C. Cir. 1987) # ("[A] licensee's interest in a broadcast license...is not a full-fledged, indefeasible property interest").

[155] *800 MHz Report and Order*, 11 FCC Rcd at 1571-1575, ¶¶ 242-250.

[156] APCO Petition at 8.

affected by this proceeding. In addition, non-SMR licensees on 800 MHz channels that are not subject to EA licensing (*i.e.* Business, I/LT and Public Safety channels may still obtain extended implementation authority under Section 90.629).

b. Rejustification of Extended Implementation Authority

90. Background. In the *800 MHz Report and Order*, we required incumbent 800 MHz licensees with extended implementation grants to submit showings rejustifying the need for extended time to construct their facilities.[157] We provided that if the Bureau approved a licensee's showing, the licensee would receive a construction period of two years or the remainder of its current extended implementation period, whichever was shorter.[158] Licensees making an insufficient or incomplete showing would have six months to construct the remaining facilities covered under their implementation plans.[159]

91. Petitions: Several petitioners seek reconsideration or clarification of the extended implementation rejustification procedures adopted in the *800 MHz Report and Order*. IC&E argues that wide-area systems that received extended implementation via waiver should not be required to submit rejustification showings because their waivers were predicated on the existence of underlying constructed analog facilities.[160] Nextel asks that we delineate the evidence that a licensee must provide to rejustify its extended implementation grant.[161] Idaho Petitioners ask that we clarify whether licensees who received license grants in the processing of the 800 MHz SMR backlog in October 1995 are eligible for extended implementation.[162]

92. Discussion. In the *800 MHz Report and Order*, we specified that all licensees with extended implementation grants would be required to file rejustification showings, regardless of whether they sought extended implementation under Section 90.629 to construct new systems or had obtained waivers to reconfigure existing high-power analog systems into low-power digital systems within the existing analog footprint.[163] IC&E argues that licensees who are converting their systems should be exempt from the rejustification requirement because they are not seeking to occupy previously unlicensed spectrum. We disagree. The waivers that were granted to licensees to convert existing analog facilities gave them considerable latitude to redeploy channels throughout the aggregate footprint of their systems, in effect allowing them to obtain new spectrum (*i.e.*, spectrum on additional channels) within their existing footprints. In order to provide EA licensees with reasonable

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157 *800 MHz Report and Order*, 11 FCC Rcd at 1525, ¶ 111.

158 *Id.* at 1525-26,¶ 112.

159 *Id.*

160 IC&E Request at 4.

161 Nextel Comments at 17-18.

162 Idaho Petition at 4-7.

163 *800 MHz Report and Order*, 11 FCC Rcd at 1524-1526, ¶¶ 110-114.

certainty regarding what spectrum is available to them, we believe it is necessary that these licensees be subject to the same timetable for constructing their systems and returning unconstructed channels as licensees who received extended implementation grants to build entirely new systems. Therefore, we deny IC&E's request for reconsideration.

93. With respect to the Nextel and Idaho Petitioners' requests, we note that since the filing of the petitions for reconsideration, the Wireless Bureau has solicited and received rejustification showings from 37 licensees, and has acted on the showings in a recent order.[164] We also note that prior to the filing of these showings, the Bureau issued a Public Notice describing the information to be provided in the rejustifications and clarifying that licensees who obtained license grants in the October 31, 1995 Bureau Public Notice, and who had extended implementation requests associated with such applications, could treat such requests as granted for purposes of the rejustification filing requirement.[165] Therefore, we dismiss Nextel's and the Idaho Petitioners' reconsideration requests as moot.

D. EA License Initial Eligibility

94. Background. In the *800 MHz Report and Order,* we concluded that restrictions on EA licensee eligibility were not warranted, except for foreign ownership restrictions required by Section 310(b) of the Communications Act.[166]

95. Petitions. Pro-Tec Mobile argues that our relocation requirements have created a *de facto* eligibility limitation. According to Pro-Tec, if EA licensees must relocate incumbent licensees onto "comparable facilities," then only entities having sufficient "comparable spectrum" to offer to incumbents can become EA licensees.[167] Pro-Tec contends that this relocation requirement will reduce the number and quality of auction participants and the amount of revenue raised.[168] Pro-Tec therefore argues that we should limit eligibility for wide-area licenses on the upper 200 channels to applicants who do not currently hold any wide-area SMR authorizations. It argues that this eligibility restriction will create more competition for EA authorizations and will increase the number of wide-area CMRS service providers.[169]

96. Discussion. We reject Pro-Tec's suggested eligibility limitation because it confuses protecting individual competitors with promoting competition. In many instances, Pro-Tec's proposal

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[164] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Order*,DA 97-1059 (May 20, 1997).

[165] *See* Recommended Filing Format for 800 MHz SMR Licensees Rejustifying Need for Extended Implementation Authority, *Public Notice* No.DA 96-894, (June 4, 1996)

[166] *800 MHz Report and Order*, 11 FCC Rcd at 1531, ¶ 126.

[167] Pro-Tec Petition at 9.

[168] *Id.*

[169] *Id.* at 8.

would preclude entities from bidding to obtain geographic area licenses that encompass spectrum they are already using. Such a restriction would be inefficient and contrary to the goals of this proceeding. By contrast, open eligibility for EA licensees is pro-competitive because it enables the market, not regulation, to determine who values the spectrum the most.

E. Redesignation of Other 800 MHz Spectrum -- General Category Channels and Inter-Category Sharing

1. General Category Channels

97. Background. In our *800 MHz Report and Order* we redesignated the General Category channels exclusively for SMR use.[170] Our licensing records showed that there are three times as many SMR licensees in the General Category as any other type of Part 90 licensee. We concluded that SMR providers' demand for additional spectrum significantly exceeds the demand of non-SMR services. Moreover, we anticipated that SMR providers' demand for this spectrum would be increased by geographic area licensing of the upper 200 channels and our mandatory relocation policy.

98. Petitions. A number of petitioners challenge our decision to reclassify the General Category based on our finding that SMR licensees outnumber non-SMR licensees on these channels. General Motors and Duke Power, for example, argue that many of these licensees are speculators who have not constructed and are not using the spectrum.[171] Consumers and UTC contend that the SMR licensing freeze and the elimination of intercategory sharing have artificially increased SMR demand for General Category channels.[172] ITA argues that we have arbitrarily reversed our prior treatment of the General Category without adequate explanation. ITA notes that in the *Competitive Bidding Second Report and Order*, we declined to subject the General Category to competitive bidding, whereas we have now determined that the General Category should be reclassified and subject to auction.[173] ITA contends that the pattern of licensing on the General Category channels has not changed dramatically since the *Competitive Bidding Second Report and Order* was adopted, and that we therefore have no basis for treating it differently now.[174]

99. Some petitioners also argue that reclassifying the General Category will harm non-SMR operations on General Category channels by stranding existing investment in internal communications

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[170] *800 MHz Report and Order*, 11 FCC Rcd at 1535, ¶ 137.

[171] General Motors Petition at 5; Duke Power Reply to Petitions at 4.

[172] Consumers Petition at 8-9; UTC Petition at 3.

[173] ITA Petition at 4-5.

[174] *Id.* at 4; *see also* UTC Petition at 3, General Motors Petition at 4. Entergy also argues that we failed to provide sufficient notice to PMRS licensees prior to the *800 MHz Report and Order* that we were considering reallocating the General Category channels. Entergy Petition at 7-8. We believe that the *Further Notice* provided more than ample notice of this issue to all parties. However, in light of our decision to maintain non-SMR eligibility for the General Category, this issue is also moot, and we decline to consider it further.

systems.[175] FedEx, for example, contends that it will have to re-engineer its nationwide network if the General Category is redesignated.[176] General Motors adds that our decision will make American industry less competitive internationally by limiting its flexibility.[177] APCO argues that denying public safety operators access to General Category channels will jeopardize police and ambulance communications systems.[178] ITA adds that redesignating the General Category channels will harm non-SMR licensees whose needs cannot be met by commercial carriers.[179] UTC argues that redesignation of the General Category channels will not facilitate relocation from the upper 200 channels, because it will make it more difficult to accommodate the relocation of non-SMR incumbents currently operating on those channels. UTC argues that a reallocation of the General Category channels is ill-advised unless we identify additional spectrum to accommodate private systems.[180]

100. Discussion. In the *800 MHz Report and Order*, we concluded based on comments in the proceeding and on our licensing records that the primary demand for General Category channels came from SMR operators.[181] Petitioners' arguments do not persuade us that this conclusion was incorrect. Petitioners concede that SMR licensees far outnumber non-SMR licensees on these channels.[182] Moreover, at the time we froze General Category licensing in 1995, we noted that the number of SMR applications for these channels had risen markedly.[183] Even if some of this increased licensing activity was attributable to speculation, as petitioners contend, we believe that such activity is itself an indication that demand for the spectrum exists. We also anticipate that with the advent of geographic area licensing on the upper 200 channels, there will be substantial demand for General Category channels among legitimate small SMR operators, including incumbents who relocate from the upper 200 channels. Based on these factors, and on the fuller record relating to 800 MHz developed in this proceeding, we believe that we were fully justified in reaching a different conclusion with respect to the General Category from that reached in the earlier *Competitive Bidding Second Report and Order.*

101. We believe, however, that petitioners have raised valid concerns with respect to the

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[175] Starrick Plumbing Petition at 1-2; J.A. Placek Construction Co Petition at 1-2; Warner Communications Co., Inc. Petition at 1-3.

[176] Fed Ex Petition at 2.

[177] General Motors Petition at 6.

[178] APCO Reply to Oppositions at 8; Entergy Petition at 14-16; Coral Gables Petition at 3; UTC Petition at 7.

[179] ITA Petition at 9; *see also* APCO Reply to Oppositions to Petitions at 8.

[180] UTC Petition at 7-8.

[181] *800 MHz Report and Order,* 11 FCC Rcd at 1535, ¶ 137.

[182] *See e.g*, Consumers Petition at 8-9; Entergy Petition at 11.

[183] Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, *Order,* 10 FCC Rcd 13190 (1995).

interests of non-SMR licensees operating on the General Category channels. As several petitioners note, our decision in the *800 MHz Report and Order* to reclassify the General Category as SMR-only would preclude non-SMRs from seeking additional authorizations on these channels to expand their systems.[184] On reconsideration, we see no reason why non-SMRs should not continue to be eligible for licensing in the General Category. By allowing non-SMRs to obtain spectrum in this band, we give non-SMRs more options and greater flexibility for continued growth of their systems.

102. While we conclude that non-SMRs should continue to be eligible for General Category licensing, we emphasize that this in no way affects our decision to license General Category channels geographically, with competing applications resolved through competitive bidding. We have not altered our conclusion in the *800 MHz Report and Order* that General Category channels are used primarily for subscriber-based services, and thus are subject to competitive bidding under Section 309(j).[185] Moreover, competitive bidding will further the public interest by encouraging efficient spectrum use, promoting competition, recovering portions of the value of the spectrum for the public and promote the rapid deployment of service. We reject petitioners' view that this approach will harm the interests of non-commercial licensees by requiring them to compete for spectrum with commercial systems. To the contrary, there are several ways in which non-SMRs can benefit from our geographic licensing rules. For example, non-commercial operators may not only apply individually for geographic area licenses, but may also participate in joint ventures (with other non-commercial operators or with commercial service providers) or obtain spectrum through partitioning and disaggregation to meet their spectrum needs. We also expect that geographic area licensing of SMR and General Category spectrum will free up non-SMR spectrum in the 800 MHz band, providing more options for non-commercial operators where availability of General Category spectrum is limited. Finally, we are continuing with our initiatives to provide sufficient spectrum for non-commercial operations through our *Refarming* proceeding and our participation in the Public Safety Wireless Activity Committee.[186]

2. Inter-Category Sharing

103. Background. Prior to the *800 MHz Report and Order*, the Wireless Bureau imposed a freeze on applications for intercategory sharing among 800 MHz Industrial/Land Transportation (I/LT), Business, and Public Safety channels (collectively, "Pool Channels").[187] This freeze was intended to

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[184] *See e.g.* Consumers Petition at 9.

[185] *See, infra*, Section F. Auctionability ¶¶ 110-115.

[186] Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Second Report and Order*, FCC 97-61 (March 12, 1997 (summarized at 62 F.R. 18834 (April 17, 1997)); The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, WT Docket No. 96-86, Notice of Proposed Rulemaking, 11 FCC Rcd 12460 (April 10, 1996).

[187] Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands, *Order*, 10 FCC Rcd 7350 (1995), *("Inter-Category Sharing Order") aff'd on reconsideration*, Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands, *Memorandum and Opinion and Order*, 11 FCC Rcd 1452 (1995)(*"Inter-Category Sharing Recon"*).

stem the increase in intercategory applications for Public Safety channels by I/LT and Business licenses whose own channels were subject to increased demand from SMR applicants. In the *800 MHz Report and Order,* we eliminated intercategory sharing by SMR licensees on all of the Pool Channels.[188] We were concerned that if we continued to allow intercategory sharing, demand for the Pool Channels by SMR applicants might render the channels unavailable to the non-SMR services for which they were originally intended. We also concluded that non-SMR licensees would no longer be eligible for intercategory sharing on SMR channels.[189] We reasoned that this would ensure that SMR licensees would not be required to continue competing with non-SMR providers for available channels.

104. Petitions. Petitioners representing I/LT and Business Radio operators oppose the elimination of intercategory sharing to the extent that it prevents them from obtaining spectrum where channels in their own pools are unavailable. ITA argues that the intercategory sharing freeze has harmed the wireless industry by prohibiting licensees from expanding in areas lacking I/LT or Business channels.[190] UTC agrees, arguing that utilities and pipelines need intercategory sharing to expand their radio systems to meet current communications requirements.[191] Duke adds that commercial demand for 800 MHz spectrum has made it virtually impossible for private system operators to obtain channels in their own pools.[192]

105. In contrast, APCO defends the current freeze on intercategory sharing with respect to Public Safety channels and opposes any effort to reopen these channels to non-Public Safety applicants.[193] APCO argues that because of the limited availability of Business and I/LT channels and our proposals for geographic licensing of the General Category, a lifting of the intercategory freeze would cause more Business and I/LT entities to seek Public Safety channels as a "safe harbor." APCO argues therefore, that a permanent bar on non-public safety applications in the Public Safety pool is needed to ensure that such channels will be available for current and future public safety use.[194]

106. Discussion. We will retain the current prohibitions on intercategory sharing between SMR and non-SMR channels. By prohibiting SMRs from applying for Pool Channels, we preserve the availability of those channels for non-commercial and public safety uses. Similarly, eliminating intercategory sharing for SMR-only channels ensures that they will be available exclusively for licensing to SMR operators. In addition, we believe that the concerns of ITA and others regarding the

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[188] *800 MHz Report and Order*, 11 FCC Rcd 1537, ¶¶ 141.

[189] *Id.* at 1537, ¶ 142.

[190] ITA Opposition to APCO and UTC's Petitions for Reconsideration at 3.

[191] UTC Petition at 8-9.

[192] Duke Petition at 4.

[193] APCO Petition at 9-10.

[194] *Id.*

availability of spectrum for I/LT and Business systems are sufficiently addressed by our decision to restore non-SMR eligibility for General Category channels.[195]

107. The remaining issues raised by petitioners relate to the Wireless Bureau's freeze on inter-category sharing among the Pool Channels by non-SMR applicants.[196] Because this decision does not affect SMR licensing, it is beyond the scope of this proceeding and we decline to address it here.

F. Auctionability

108. Background. In the *800 MHz Report and Order*, we reiterated our conclusion that competitive bidding is an appropriate licensing mechanism for the 800 MHz SMR service.[197] We concluded that the 800 MHz SMR service satisfies the criteria set forth by Congress for determining when competitive bidding should be used. We noted that competitive bidding will further the public interest requirements of the Communications Act by promoting rapid deployment of services, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use.[198] We further noted that where competitive bidding is used, a diverse group of applicants including incumbent licensees and potential new entrants into this service will be able to participate in the auction process because we have decided not to restrict eligibility for EA licenses.[199] Finally, we adopted special provisions for small businesses seeking EA licenses.[200]

109. Petitions. Several petitioners once again request that the Commission use procedures other than competitive bidding to license 800 MHz SMR. In essence, petitioners contend that this band does not fit within the Congressional criteria for auctions[201] because (i) Congress did not intend for the 800 MHz SMR band to be auctioned;[202] (ii) the competitive bidding design for the upper 10 MHz channels of the 800 MHz SMR band does not promote the objectives contained in Section 309(j) of the Communications Act;[203] and (iii) the Commission has failed to consider alternative licensing

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[195] *See supra*, ¶ 101.

[196] *See Inter-Category Sharing Order*, 10 FCC Rcd 7350; *Inter-Category Sharing Recon*, 11 FCC Rcd 1452.

[197] We previously stated this conclusion in the *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360, and the *CMRS Third Report and Order*, 9 FCC Rcd at 8140.

[198] *800 MHz Report and Order*, 11 FCC Rcd at 1540.

[199] *Id.*

[200] *Id.* at 1574.

[201] *See e.g.*, Southern Petition at 5; Banks Petition at 2-3; SBT Petition at 7; PCIA Petition at 5-7; Fresno Mobile Radio Petition at 17.

[202] Southern Petition at 11-12.

[203] SBT Petition at 9-13; Supreme Radio Petition at 6-7.

mechanisms which avoid mutually exclusive applications.[204]

110. Discussion. We reaffirm our conclusion that competitive bidding is an appropriate tool to resolve mutually exclusive license applications for the upper 10 MHz channels of the 800 MHz SMR service. Moreover, the criteria for auctionability set forth in Section 309(j) of the Communications Act are met.[205] We have fully considered the issues raised here by petitioners both in the *800 MHz Report and Order* and the *Competitive Bidding Second Report and Order*.[206] We continue to believe that competitive bidding is appropriate for the upper 10 MHz of the 800 MHz SMR spectrum and that employing this procedure strikes a reasonable balance in protecting the public interest in the use of the spectrum while promoting the objectives specified in the Communications Act.

111. The Commission disagrees with petitioners' contention that Congress did not intend that the upper 10 MHz of the 800 MHz SMR spectrum be auctioned.[207] PCIA, for example, argues that Congress intended auctions to be used for the licensing of new services and not for currently allocated services, such as the upper 10 MHz of the 800 MHz SMR.[208] We disagree with this position because Section 309(j) of the Communications Act does not distinguish between new services and existing services in terms of whether initial licenses in a given service should be subject to competitive bidding.[209] Furthermore, there is nothing in the legislative history to indicate that Congress intended to limit the applicability of auctions to new services.[210] As we noted in the *Competitive Bidding Second Report and Order*, the principal use of 800 MHz SMR is to provide service to eligible subscribers for compensation. We conclude that the use of competitive bidding in the upper 10 MHz block is fully consistent with Section 309(j) of the Communications Act and its legislative history.[211]

112. In the *Competitive Bidding Second Report and Order*, we concluded that our auction

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[204] PCIA Petition at 8.

[205] Under 47 U.S.C. § 309(j), the Commission has authority to grant initial licenses through competitive bidding if mutually exclusive applications are accepted for filing, the principal use of the spectrum is a subscription service, and the system of competitive bidding promotes the design objectives of 47 U.S.C. § 309(j)(3).

[206] *See 800 MHz Report and Order*, 11 FCC Rcd at 1540-41; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360.

[207] SBT Petition at 4; PCIA Petition at 7; Southern Petition at 5-7.

[208] PCIA Petition at 7-8. Southern similarly contends that the Commission lacks authority to conduct auctions of heavily occupied spectrum. Southern Petition at 5-7.

[209] 47 U.S.C. § 309(j), "If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority . . . to grant such license or permit . . . through the use of a system of competitive bidding . . . ." (emphasis added).

[210] *See* H.R. Report No. 103-111, 103d Cong., 1st Sess., at 540 (1993) ("[S]ection 309(j) is a generic statute that will govern the issuance of licenses in many different services").

[211] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359-60.

designs are calculated to meet the policy objective of introducing new technologies to the public.[212] Several petitioners contend that the competitive bidding procedures for the upper 10 MHz of the 800 MHz SMR do not promote the Section 309(j) objectives.[213] Banks Tower Communications, Ltd. ("Banks"), for example contends that the Commission's auctioning policies do not ensure that winning bidders will employ advanced technologies to serve the public.[214] However, neither Banks nor any other commenter raises any new arguments that persuade us to change our conclusion that making the 800 MHz SMR spectrum available for public use through auctioning will lead, most efficiently and effectively, to the deployment of new technologies and services to the public. As we noted in the *Competitive Bidding Eight Report and Order*, we believe that competitive bidding furthers the public interest by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public and encouraging efficient spectrum use.[215]

113. The Commission does not agree with the contention of some petitioners that the administrative procedures associated with licensing through auctions are not as efficient as site-specific licensing.[216] We previously addressed the advantages to both the Commission and licensees of geographic area licensing.[217] Petitioners do not raise any new arguments that would persuade us to reconsider the adoption of EA licensing for the 800 MHz SMR service. We again emphasize that geographic area licensing offers a flexible licensing scheme that eliminates the need for many of the complicated and burdensome licensing procedures that hampered SMR development in the past.[218]

114. In response to requests by petitioners, the Commission considers yet again whether auctioning allows for the dissemination of licenses among a wide variety of entities in the 800 MHz SMR spectrum.[219] Several petitioners, for example, believe that auctioning will lead to the concentration of licenses in the hands of a few operators in each market to the detriment of small businesses.[220] We disagree with the contention that small businesses will not be able to participate in

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[212] *Id.* at 2360.

[213] *See e.g.*, Southern Petition at 7; Supreme Radio Petition at 4; Banks Petition at 2-3. These objectives include: (i) development and rapid deployment of new technologies and services; (ii) avoiding processing delays and excessive concentration of licenses; (iii) promoting economic opportunity and (iv) the efficient use of the spectrum. 47 U.S.C 309(j)(3).

[214] Banks Petition at 2-3.

[215] *800 MHz Report and Order*, 11 FCC Rcd at 1540.

[216] Banks Petition at 2; PCIA Petition at 10.

[217] *CMRS Third Report and Order*, 9 FCC Rcd at 8042-5.

[218] *Id.*

[219] *See* Southern Petition at 15; Fresno Mobile Radio Petition at 18-22.

[220] Fresno Mobile Radio Petition at 22; Banks Petition at 2-3; Southern Petition at 18-19.

these auctions.[221] The auction rules for the upper 800 MHz SMR include small business provisions such as bidding credits and other measures that are intended to meet the statutory objective of providing opportunities for small businesses in the upper 10 MHz channels of the 800 MHz SMR service.[222] The results of prior auctions demonstrate that these provisions have ensured small businesses participation in other auctionable services. We further note that because the 800 MHz SMR service falls within the definition of the Commercial Mobile Radio Services (CMRS),[223] it is subject to the 45 MHz aggregate spectrum cap on CMRS.[224] The spectrum cap has been placed on CMRS licensees in order to promote and preserve competition in the CMRS marketplace by limiting the number of licenses any one entity can acquire. [225]

115. The Commission has further considered various alternative licensing procedures for the 800 MHz SMR band as requested by several petitioners.[226] These petitioners contend that Section 309(j)(6)(E) of the Communications Act prohibits the Commission from conducting an auction unless it first attempts alternative licensing mechanisms to avoid mutual exclusivity.[227] In the course of this proceeding, we have evaluated the appropriateness of other licensing mechanisms for the upper 800 MHz SMR, but concluded those methods are not in the public interest. For example, we have found that "first-come, first-served" licensing in the 800 MHz service leads to processing delays.[228] For the upper channels of the 800 MHz SMR frequency band, the use of competitive bidding is the most appropriate licensing procedure because we anticipate a considerable number of applications for these licenses and competitive bidding will allow the most expeditious access to the spectrum if any of these applications is mutually exclusive.[229] Therefore, we reject once again other licensing procedures for the upper 800 MHz SMR spectrum. In doing so, we must emphasize that the Commission has made

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[221] SBT Petition at 9-13; Supreme Radio Petition at 6; Fresno Mobile Radio Petition at 17; PCIA Petition at 10.

[222] *See* 47 U.S.C. § 309(j)(3)(B). For example, in the 900 MHz SMR auction, which concluded on April 15, 1996, the Commission established special provisions, such as bidding credits and favorable installment payment terms for small business participating in that auction. Because of the special provisions in the 900 MHz SMR auction, 101 of the 128 qualifying bidders were able to claim small business status. Ultimately, in the 900 MHz SMR auction, bidders that qualified as eligible small businesses won 26% of the licenses. In the Multipoint/Multichannel Distribution Service (MDS) auction, eligible small businesses won 77% of the licenses.

[223] *CMRS Second Report and Order*, 9 FCC Rcd at 1450-51.

[224] *CMRS Third Report and Order,* 9 FCC Rcd at 7993; 47 C.F.R. § 20.6.

[225] *See Broadband PCS/CMRS Spectrum Cap Report & Order* 11 FCC Rcd at 7869.

[226] PCIA Petition at 8; SBT Petition at 7; Pro-Tec Petition at 6.

[227] Section 309(j)(6)(E) provides that when it is in the public interest, the Commission should "continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means" to avoid mutual exclusivity. *See* SBT Petition at 7; Pro-Tec Petition at 6; PCIA Petition at 8.

[228] *800 MHz Report and Order*, 11 FCC Rcd at 1541.

[229] *CMRS Third Report and Order*, 9 FCC Rcd at 8135.

every effort to include the SMR industry in the decision-making process to make certain that the concerns of the industry and, particularly, incumbents are addressed by the Commission.[230]

G. Bidding Issues

1. Bid Increment

116. Background. In the *800 MHz Report and Order* for the upper 10 MHz block, we adopted the same procedures for bid increments as those used in auctions for MTA-based PCS licenses.[231] We also indicated that we would retain the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of the auction.[232]

117. Petitions. Nextel supports a minimum bid increment but believes that tying the minimum bid to the absolute minimum bid establishes an artificial value for each license rather than allowing the marketplace to determine the value of the licenses.[233] Instead, Nextel supports a five percent minimum bid increment because it will ensure active participation by bidders without requiring a disparate increase from one round to the next.[234]

118. Discussion. After considering the record, we modify our rules to delegate authority to the Bureau to set appropriate bid increments. Our experience with other auctions indicates that flexibility is necessary to set appropriate bidding levels to account for the pace of the auction, the needs of the bidders, and the value of the spectrum. While we believe that a bid increment of $0.02 MHz-pop is appropriate here, we will delegate authority to the Bureau to vary the minimum bid increment over the course of the auction as it deems necessary. The Bureau will announce by Public Notice prior to the auction the general guidelines for bid increments.

2. Upfront Payment

119. Background. In the *800 MHz Report and Order*, we determined that the upfront payment for the upper 800 MHz SMR service should be $0.02 per MHz-pop, with a minimum payment of $2500. We indicated that in the initial Public Notice, we would announce population information and upfront payments corresponding to each EA license. Further, we noted that

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[230] The filings in this docket reveal numerous ex parte contacts between the Bureau and representatives of 800 MHz SMR incumbents. *See e.g.*, "Wireless Telecommunications Bureau Invites Interested Parties To Attend Meeting Regarding Pending Proposals For Wide-Area Licensing Of and Competitive Bidding Rules For the 800 MHz Specialized Mobile Radio Service," *Public Notice*, DA 95-1965 (Sept. 12, 1995). *See also 800 MHz Report and Order*, 11 FCC Rcd at 1674 (separate statement of Commissioner Barrett).

[231] *800 MHz Report and Order*, 11 FCC Rcd at 1550.

[232] *Id.*

[233] Nextel Petition at 8.

[234] *Id.*

population coverage for each channel block in each EA will be based on a formula that takes into account the presence of incumbent licenses.[235]

120. Petitions. Supreme Radio requests the Commission to set a lower upfront payment contending that $0.02 per MHz-pop is too high given the value of these licenses.[236] AMTA requests that the Commission reconsider its decision to use upfront payments that take into account the presence of incumbent licenses because of the uncertainty that results from ongoing channel relocation by incumbents.[237] AMTA believes that prospective bidders would be better served by being advised that the band in heavily encumbered, by being provided with either a list of those incumbents or information as to how that information may be obtained.[238]

121. Discussion. We reaffirm our upfront payment formula of $0.02 MHz-pop and uniform discounting for incumbency. We also reaffirm a minimum upfront payment of $2500. We believe that it is necessary to set an adequate upfront payment to ensure participation by qualified bidders. However, as commenters suggest, we recognize that for purposes of these particular licenses the standard upfront payment formula may yield higher payment as compared to the values of the license. We will modify our rules to delegate authority to the Bureau to vary the minimum upfront payment when it determines that the standard $0.02 per MHz-pop formula would result in an unreasonably high upfront payment. In determining an appropriate upfront payment, the Bureau may take into account such factors as the population and the approximate amount of usable spectrum in each EA. The Bureau will announce any such modification by Public Notice.

3. Activity Rules

122. Background. In the *800 MHz Report and Order*, we adopted the three-stage Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. We noted that an activity rule ensures that an auction will close within a reasonable period of time by requiring a bidder to remain active throughout the auction. We further noted that under the Milgrom-Wilson approach, bidders are required to declare their maximum eligibility in terms of MHz-pops, and to make an upfront payment equal to $0.02 per MHz-pop.[239] We also noted that the population calculation in each EA will be discounted to take into consideration the presence of incumbent licensees.[240]

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[235] *800 MHz Report and Order*, 11 FCC Rcd at 1557.

[236] Supreme Radio Petition at 6.

[237] *See* AMTA Petition at 5. AMTA contends that as a result of ongoing frequency exchanges there was difficulty in determining upfront payments in the 900 MHz SMR proceeding because the amount of incumbency in the channel blocks changed after upfront payments were established.

[238] *Id.*

[239] A bidding unit (also known as an "activity unit") is defined as the number of megahertz of spectrum multiplied by the population of the relevant license area, or "pops." The bidding units/MHz-pops measurement is used to describe the activity rules, stage transaction rules, bid increment rules, etc.

[240] *800 MHz Report and Order*, 11 FCC Rcd at 1557.

123. Petitions. Supreme Radio requests the Commission to reconsider the decision to adjust the bidding unit of an EA based on the occupation of channel blocks by incumbents unless the incumbent has constructed facilities. It contends that the allowance of a downward adjustment irrespective of whether facilities have been constructed unjustly enriches those entities holding unconstructed authorizations.[241]

124. Discussion. We affirm our decision to use a three-stage Milgrom-Wilson activity rule for the upper 10 MHz channels of the 800 MHz SMR service. We also reaffirm the use of a uniform discount on the upfront payment to take into consideration the presence of incumbent licenses. We disagree with the recommendation that a downward adjustment should be made for constructed facilities only. This proposal would require the Commission to make an unsupported assumption that none of the entities holding unconstructed authorizations ever intend to build out their systems.

H. Treatment of Designated Entities

1. Bidding Credits

125. Background. In the *800 MHz Report and Order*, we did not adopt bidding credits for designated entities participating in the auctions for the upper 10 MHz channels of the 800 SMR service. Bidding credits initially had been proposed for businesses owned by women and minorities.[242] As a result of the Supreme Court's decision in *Adarand*,[243] in the *800 MHz Report and Order* the Commission concluded there was an insufficient record to support the adoption of special provisions solely benefitting minority- and women-owned business (regardless of size) for the upper 10 MHz block auction.[244]

126. Petitions. Petitioners request that the Commission provide bidding credits to small businesses in order to provide these entities with a meaningful opportunity to obtain licenses in the 800 MHz SMR service auction.[245]

127. Discussion. In this instance, we grant petitioners' request and will provide bidding credits to small businesses. We note that in the *800 MHz Report and Order*, we concluded that special provisions for small businesses are appropriate for the 800 MHz SMR service.[246] We also recognize that smaller businesses have more difficulty accessing capital and thus may need a higher

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[241] Supreme Radio Petition at 9.

[242] *800 MHz SMR FNPRM*, 9 FCC Rcd at 8014.

[243] *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995) (where the Supreme Court held the constitutionality of any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest).

[244] *800 MHz Report and Order*, 11 FCC Rcd at 1575.

[245] AMTA Petition at 4; RBI Petition at 6; PCIA Partial Opposition at 5.

[246] *800 MHz Report and Order*, 11 FCC Rcd at 1574.

bidding credit. Accordingly, we will adopt tiered bidding credits that are narrowly tailored to the varying abilities of businesses to access capital. Tiering also takes into account that different small businesses will pursue different strategies. In determining eligibility for these bidding credits, we will employ the same tiered definitions of small businesses as used in the *800 MHz Report and Order* to determine eligibility for installment payments in the upper 10 MHz,[247] with an adjustment to reflect the unavailability of installment payment plans for the 800 MHz SMR services. Accordingly, a small business with average gross revenues that do not exceed $15 million will be eligible for a bidding credit of 25 percent. A small business having revenues that do not exceed $3 million will be eligible for a bidding credit of 35 percent. Revenues will be defined as average gross revenues[248] for the last three years including affiliates.[249] These are the same levels of bidding credits used in the WCS auction.[250]

2. Installment Payments

128. Background. In the *800 MHz Report and Order*, we adopted rules which provided small businesses participating in this auction with tiered installment payment plans. We noted that we adopted the same tiered installment payment approach as in the 900 MHz SMR auction.[251]

129. Petitions. Nextel requests that the Commission eliminate all installment payment plans for the upper 200 channels on the basis of its belief that in prior auctions, the availability of installment payments has encouraged speculation and warehousing.[252] PCIA disagrees, stating that installment payments are the only means by which independent, incumbent SMR operators will be able to participate in the auctions.[253] RBI believes that the tiered approach to installment payments is insufficient to ensure meaningful participation by small businesses, and as an alternative asks for 50 percent bidding credits.[254]

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[247] *Id. See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60, 62 Fed. Reg. 13,540 (rel. Feb. 28, 1997) (*Part One NPRM*).

[248] In promulgating competitive bidding rules for auctionable services, the Commission has adopted similar definitions for "gross revenues," although those definitions have contained some distinctions regarding the use of audited and unaudited financial statements. See 47 C.F.R. § 24.720(f), defining "gross revenues" in the context of our broadband PCS rules. In a recently released Notice of Proposed Rule Making, the Commission proposes to use this definition for all size-based determinations for all auctionable services. *See Part One NPRM*.

[249] *See* 47 C.F.R. § 1.2110(b)(4).

[250] *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 62 Fed. Reg. 9636 (1997) (*WCS Report and Order*).

[251] *800 MHz Report and Order*, 11 FCC Rcd at 1574.

[252] Nextel Petition at 8.

[253] PCIA Partial Opposition to Petitions at 5. *See also* SBT Reply at 15.

[254] RBI Petition at 7.

130. Discussion. We will grant Nextel's petition, and not adopt installment payments for the upper 200 channels. While we disagree with Nextel's contention that installment payments encourage speculation and warehousing of spectrum, our experience with the installment payment program leads us to conclude that installment payments may not always serve the public interest. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants. Currently, the Commission is reviewing a number of issues related to administration of installment payment programs.[255] Nonetheless, given that applications for new 800 MHz SMR licenses have not been accepted since 1994, our priority is to facilitate the licensing of the upper 200 channels without further delay. Therefore, we believe that the public interest is best served by going forward with the auction for the upper 200 channels without extending installment payments to small businesses while we consider installment payment issues generally.

131. We disagree with PCIA's contention that installment payments are the only means by which small SMR operators will be able to participate in auctions. We note that in other auctions in which installment payments were not available, small businesses were the high bidders on a significant number of licenses.[256] Further, Section 309(j)(4) requires the Commission to consider alternative methods to allow for dissemination of licenses among a wide variety of applicants, including small businesses. To encourage small business participation, we have raised the bidding credits available to small businesses and very small businesses to 25 percent and 35 percent respectively.[257] We believe that higher bidding credits, as suggested by RBI, will both fulfill the mandate of Section 309(j)(4)(D) to provide small business with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

132. In view of our decision here, all winning bidders will be required to supplement their upfront payments with down payments sufficient to bring their total deposits to 20 percent of their winning bid(s). Consistent with our determination in the *Second Report and Order*, we will allow

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[255] *See Part One NPRM*, ¶¶ 34-35; *see also* Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues, DA 97-679, *Public Notice* (June 2, 1997). Several parties filed Petitions for Reconsideration in the paging and LMDS proceedings, in which they requested that the Commission reconsider adopting installment plans for small businesses. *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Petitions for Reconsideration*, filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997. *See also* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignated the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Petition for Reconsideration*, filed by Cook Inlet Region, Inc., May 29, 1997 and *Petitions for Partial Reconsideration*, filed by WebCel Communications, Inc. and CellularVision USA, Inc., filed May 29, 1997.

[256] In the WCS auction, which had no installment payments and bidding credits of 25 percent for small businesses and 35 percent for very small businesses, 25 percent of the licenses went to small or very small businesses. In the cellular unserved area auction, which had no special bidding provisions, 36 percent of the licenses went to small or very small businesses.

[257] *See* discussion at Sec. IV(H)(1), *infra*. *See also WCS Report and Order at ¶ 193* (where the Commission adopted 25 percent and 35 percent bidding credits for small businesses and very small businesses, respectively).

bidders up to ten days following the close of the auction to make their down payments.[258]

3. Attribution of Gross Revenues of Investors and Affiliates

133. Background. In the *800 MHz Report and Order*, we adopted a definition of small business which included attributing the gross revenues of investors owning 20 percent or more in the applicant.[259] In light of the pending petitions for reconsideration, the Commission, on its own motion, retains jurisdiction to reconsider the attribution rule.[260]

134. Discussion. In determining eligibility for small business provisions, we will modify our attribution rule to substitute the "controlling principal" concept for the attribution model as we recently did for auctions involving other services.[261] Specifically, we will eliminate the rule attributing the revenues of certain investors. We will only attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of the affiliates of the applicant. We will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain both *de jure* and *de facto* control of the applicant. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; and (3) the entity plays an integral role in all major management decisions.[262] This simplified procedure was adopted for auctions involving other services.[263] We believe this modification of our attribution rule will enhance the opportunity for a wide variety of applicants to obtain licenses. Specifically, we will follow the attribution rules discussed in the Lower 80 and General Category licenses section of the *Second Report and Order* in Section 2(a), *Small Business Definition.*

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[258] *See 800 Second Report and Order* at Sec. IV(F)(2)(e)(iv).

[259] *800 MHz Report and Order*, 11 FCC Rcd at 1574.

[260] *See Central Florida Enterprises v. FCC*, 598 F.2d 37, 48, n.51 (D.C. Cir. 1978), *cert. dismissed* 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914, n.8 (1990).

[261] *See* Implementation of Sections 3(n) and 332 of the Communications Act - Competitive Bidding Narrowband PCS, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175, 222 (1994) (*Narrowband PCS Opinion and Order*); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems/Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC 97-59, WT Docket No. 96-18, PP Docket No. 93-253, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2812 (1997) (*Paging Report and Order*). *See also Part One NPRM*, ¶¶ 28-29.

[262] *See* 13 C.F.R. § 121.401.

[263] *See e.g., Paging Report and Order*, 12 FCC Rcd at 2812 (1997).

V. ORDERING CLAUSES

135. IT IS ORDERED that, pursuant to the authority of Sections 4(i), 302, 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(r), and 332(a), the rule changes specified in Joint Appendix B are adopted.

136. IT IS FURTHER ORDERED that the rule changes set forth in Joint Appendix A WILL BECOME EFFECTIVE 60 days after publication in the Federal Register.

137. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by the parties listed in Appendix A-- ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DENIED.

138. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Analysis contained in Appendix D of the *Second Report and Order*, pertaining to the rules specified in Joint Appendix B of the *Second Report and Order*, IS HEREBY INCORPORATED BY REFERENCE.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Petitions for Reconsideration
American Mobile Telecommunications Association (AMTA)
Banks Tower Commmunications (Banks)
City of Coral Gables (Coral Gables)
Consumers Power Co. (Consumers)
Digital Radio L.P. (Digital)
Entergy Services, Inc. (Entergy)
Erricsson Corp. (Ericsson)
Fed Ex (Fed Ex)
Fresno Mobile Radio Inc. (Fresno)
General Motors Research Corp. (General Motors)
Idaho Communications and Electric (IC&E)
Industrial Telecommunications
Nextel Communications
Personal Communications Industry Association
Pro-Tec Mobile
The Southern Company
Supreme Radio Communications
UTC
Resource Benefits, Inc.
JA Placek Construction Company
Warner Communication
Starrick Plumbing

Oppositions to Petitions for Reconsideration
Industrial Telecommunications Association
PCIA
Nextel

Replies to Oppositions to Petitions for Reconsideration
Association of Public Safety
Digital
Duke Power Company (Duke Power)
Entergy
Erriccson
General Motors
Industrial Telecommunications Association
Motorolla
Nextel
PCIA
Small Businesses in Telecommunications
UTC

Separate Statement
of Commissioner Rachelle B. Chong

Re: *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, *Memorandum Opinion and Order on Reconsideration* and *Second Report and Order*

The decisions we issue today complete our process of developing a new licensing framework for 800 MHz licensees. I support our decisions because I believe that our movement away from a site-by-site to a geographic licensing scheme not only eliminates a cumbersome administrative process, but also promotes competition, provides SMR licensees with additional flexibility, and brings our 800 MHz regulation more into sync with our regulation of other CMRS providers.

I also support our decision to award mutually exclusive applications for these geographic licensees through competitive bidding. Most of the auction rules we have adopted for the 800 MHz service are consistent with the rules we have adopted for other services. In one significant respect, however, we have departed from Commission precedent: on reconsideration we decided to eliminate installment payments for small businesses who participate in the auction for the upper 200 channels, and we have deferred the issue of the propriety of the installment payments for the lower 230 channels to our Part 1 rulemaking. I supported these decisions because I share my colleagues' concerns about the difficulties associated with the Commission's administration of the installment payment program, and I felt that we should not delay the 800 MHz auctions while we worked out these issues. However, I write separately to express my concern about what this change might mean to small businesses' and woman and minority-owned businesses' ability to participate in this and future auctions.

The Commission has an obligation in designing its auction procedures under section 309(j) to seek to disseminate licenses among a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission's obligation to promote opportunities for small businesses is also set forth in section 257 of the Act. Although Sections 309(j) and 257 give the Commission significant discretion in deciding how to achieve this objective, to date, installment payments, together with bidding credits, have been the primary means the Commission has used to overcome these barriers and enhance the opportunities for small businesses and women and

minority-owned enterprises.[264] I am worried that our decision to eliminate installment payments for the upper 200 channels will adversely impact the designated entities who wish to bid on these licenses. In this regard, our recent report summarizing the Commission's implementation of section 257 noted commenting parties' belief that a lack of access to the capital markets and insufficient financing is the major barrier to small business participation in the Communications market.[265]

That being said, I share my colleagues' concern that the installment payment program, as currently structured, has put the Commission in a very difficult position. There is an inherent conflict between the Commission's dual role as regulator and lender. We are now struggling with how to resolve this tension in response to requests by PCS C Block licensees to restructure payment obligations. I can appreciate the reluctance to expand the scope of the installment payment program until we work through some of these difficult issues.

I do not know what the solution should be, but I encourage all commenters, including representatives of small businesses and women and minority-owned enterprises, to think creatively about ways in which we can make the installment payment program more workable or to suggest other mechanisms we can pursue to enhance opportunities for these businesses.

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[264] *See, e.g., Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the CMRS Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7844 (1996); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136, 158 (1995).

[265] *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, GN Docket No. 96-113, FCC 97-164, ¶¶ 35-36 (rel. May 8, 1997) (citing respondents to the Small Business in Telecommunications survey).